

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

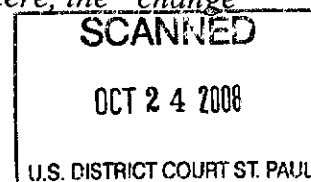
08-CR-00010-PJS/FLN

UNITED STATES OF AMERICA,	)	JUDGE PATRICK J. SCHILTZ
)	
Plaintiff,	)	MAGISTRATE JUDGE
	)	FRANKLIN L. NOEL
v.)	
	)	MEMORANDUM OF LAW
FRANCIS LEROY McLAIN,	)	IN SUPPORT OF MOTION
	)	TO DISMISS FOR FAILURE
Defendant.	)	TO STATE AN OFFENSE
	)	and FOR DEFECTIVE
	)	INDICTMENT PER FRCRP
	)	12(b)(3)(B) & 7(c)(1) & 7(c)(3)

The defendant objects to being prosecuted under a Code that is a revision of the Statutes at Large. 26 U.S.C. Section 7202 does not reflect the original context of the Statutes.

In United States v. Welden, the Supreme Court has declared the following:

61 Stat. 638, 1 U.S.C. Section 204 (a) declares that the United States Code establishes "prima facie the laws of the United States, general and permanent in their nature"... This Court, in construing that statute has said that "the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent". Stephan v. United States, 319 U.S. 423, 426. Even where Congress has enacted a codification into positive law, this Court has said that the "change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 227, quoting Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 198-199. Certainly where, as here, the "change



of arrangement” was made by a codifier without the approval of Congress, it should be given no weight. “If construction [of a section of the United States Code which has not been enacted into positive law] is necessary, recourse must be had to the original statutes themselves.” Murrell v. Western Union Tel. Co., 160 F.2d 787,788. Accordingly, ... we must read it in the context of the entire Act, rather than in the context of the “arrangement” selected by the codifier. United States v. Welden, 84 S.Ct. 1082, 377 U.S. 95, at footnote 4.

The Office of the Law Revision Counsel of the U.S. Congress states that Title 26 U.S.C. has not been enacted into positive law. The prosecution must go back to the Statutes at Large to present the real evidence of the law which the U.S. Congress enacted. These are found by going to corresponding tables at the end of the revised Code, and doing the appropriate research. These Tables of Reference provided by Congress in the 1954 Code have not changed and are still found in the Code today. Now they can be found on the internet at the following official government website: http://uscode.house.gov/download/title_26.shtml by clicking on the second item listed: Title 26 - (Complete title)(25.6700 MB). At Table II, it shows the corresponding sections of the 1939 Code from which Section 7202 was derived.

The legislative history and notes will reveal whether any particular Section of the Code is a newly enacted law, an amended law, or whether the Section is a re-statement based on laws already enacted in the past by Congress. Looking at the legislative notes involved with Section 7202, both houses of Congress clearly state that this Section 7202 was based on law that was already existing:

This provision corresponds to numerous sections of existing law which cover this offense. United States Code Congressional and Administrative News of the 83rd Congress – Second Session 1954, pages 4572 (the House Report) and 5251 (the Senate Report).

Title 1 USC Section 204 (a) states the following about the United States

Code:

(a) United States Code. The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish *prima facie* the laws of the United States Provided, however, that whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possession of the United States.

The official legislative history and reviser's notes from the United States Code Congressional Services publication of the criminal code of Title 18, which was approved June 25, 1948, on pages 2705 & 2706, documents the following exchange between a member of the House subcommittee, Mr. Robsion, and the Honorable Albert B. Maris, United States Circuit Court Judge for the Third Circuit, Philadelphia, Pennsylvania:

Mr. Robsion: Now, in this regard, our present statute of the Code is just *prima facie* evidence of the laws, and we have all the laws grouped and if we have the laws grouped appropriately, it would be the law itself.

Judge Maris: Mr. Chairman, this is a very important point. We have the United States Code. It is a tool that is very useful, and it is widely used, not only by judges, but by lawyers and the public, and it is not generally realized, I think – certainly not by the public – **that it is not the law**, that it is **only evidence of the law**. They read a section in the United States Code, and it is **assumed** that that is the law. **(bold emphasis added)**

Now, that may not be the law. You have to run back to the revised statutes or whatever the source material is for that particular section to see whether there has been any change made there that might be deemed of substance.

The function of the U.S. Attorney's Office is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.

The defendant objects to the hearsay or *prima facie* evidence of the law titled 26 USC Section 7202 under which he is being prosecuted. The Defendant hereby challenges the prosecution to show him the context in which 26 U.S.C. Section 7202 is used in the Statutes at Large to specifically show that it relates to the violations charged in the nine counts.

Federal Rules of Criminal Procedure states in part the following:

Rule 7 (c) Nature and Contents.

(1) In General.

...For each count, the indictment or information must give the official or customary citation of the **statute, rule, regulation,** or other **provision of law** that the defendant is alleged to have violated.

What is Title 26 U.S.C. Section 7202? It is not a statute. It is not a rule. It is not a regulation. It is not a provision of law. It is not legal evidence of law.

Rule 7 (c) Nature and Contents.

(3) Citation Error.

Unless a defendant was misled, and thereby prejudiced, neither an error in a citation, nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

In the instant matter, the defendant has been misled by the false "felony" charge, and thereby has been pre-judged by its use. Therefore, the indictment is

defective and there are grounds for dismissal. There is no evidence in the indictment or in subsequent discovery that any true **law** was ever mentioned or revealed to the Grand Jury in its deliberations.

*[I]f there is a conflict between the original Congressional enactment contained in the Statutes at Large and a codification that has been enacted into positive law, **the Statutes at Large control** when (1) the meaning of the original enactment was "clear and quite different from the meaning . . . ascribe[d] to the codified law," and (2) "the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect." Cass v. United States, 417 U.S. 72, 82 (1974); see Welden, 377 U.S. at 98 n.4; see also Finley v. United States, 490 U.S. 545, 554 (1989). Washington-Dulles Transp., Ltd. v. Metropolitan Washington Airports Authority, 263 F.3d 371 4th Cir. (2001)*

To reiterate, the United States Supreme Court has been clear that when the Code is not consistent with the context and meaning of the Statutes at Large:

The Code establishes "prima facie" the laws of the United States. But the very meaning of "prima facie" is that the Code cannot prevail over the Statutes at Large when the two are inconsistent. Stephan v. United States, 63 S.Ct. 1135, 319 U.S. 423 (1943)

The following maxim of law is relevant to this present situation.

Quaerere dat sapere quae sunt legitima vere. To investigate is the way to know what things are truly lawful.

Under the Sixth Amendment to the Constitution for the United States the defendant has a right to know the **nature and cause** of the accusation. He has the right to have the prosecution to **show him the law**, the specific Statutes at Large that he is accused of violating. The indictment fails to do this.

Therefore, as a matter of law, the indictment should be dismissed as defective. The prosecution has failed to state an offense. The original law upon

which Section 7202 relates has no nexus with employment taxes. The penalty Section 7202 simply cannot be violated standing on its own. It must relate back to the enacted sections of law to which Congress intended it to be applied. The sections of the Statutes at Large to which this penalty section originally apply contain no mention of employment taxes. The felony criminal penalties listed in 26 U.S.C. Section 7202 are for offenses not mentioned in the indictment.

Therefore, this court simply does not have criminal subject-matter jurisdiction to hear the above-styled matter. The indictment does not state nor reveal any “**law** of the United States” which the Defendant has been accused of violating. Only a **code** of the United States has been mentioned, and no Statute at Large has been referenced in the indictment.

Wherefore, the Defendant respectfully moves the Court to dismiss the action, and give him the relief requested and any damages this Court thinks applicable.

This motion is based on the indictment, the records and files in the above-entitled action, and any and all other matter which may be presented prior to or at the time of the hearing of said motion.

Respectfully submitted,

Rick Mattox,
Court-Appointed Counsel for the Defendant